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# Final Report

## Harmonisation of OH&S Regulations

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## EXECUTIVE SUMMARY

Policy instruments of education, regulation, fines and inspection have all been utilised by Australian jurisdictions as they attempt to improve the poor performance of occupational health and safety (OH&S) in the construction industry. However, such policy frameworks have been largely uncoordinated across Australia, resulting in differing policy systems, with differing requirements and compliance systems. Such complexity, particularly for construction firms operating across jurisdictional borders, led to various attempts to improve the consistency of OH&S regulation across Australia, four of which will be reviewed in this report.

1. The first is the *Occupational Health and Safety Act 1991* (Commonwealth) which enabled certain organisations to opt out of state based regulatory regimes.
2. The second is the development of national standards, codes of practice and guidance documents by the National Occupational Health and Safety Council (NOHSC). The intent was that the OHS requirements, principles and practices contained in these documents would be adopted by state and territory governments into their legislation and policy, thereby promoting regulatory consistency across Australia.
3. The third is the attachment of conditions to special purpose payments from the Commonwealth to the States, in the form of OH&S accreditation with the Office of the Federal Safety Commissioner.
4. The fourth is the development of national voluntary codes of OHS practice for the construction industry.

It is interesting to note that the tempo of change has increased significantly since 2003, with the release of the findings of the Cole Royal Commission. This paper examines and evaluates each of these attempts to promote consistency across Australia. It concludes that while there is a high level of information sharing between jurisdictions, particularly from the NOSHHC standards, a fragmented OH&S policy framework still remains in place across Australia. The utility of emergent industry initiatives such as voluntary codes and guidelines for safer construction practices to enhance consistency are discussed.

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# 1. INTRODUCTION

Recently released research reports into the construction industry in Australia have argued that improved consistency in the regulatory environment could lead to improvements in innovation (Manley 2004, Price Waterhouse Coopers 2002), improved productivity (Productivity Commission 2004), and that research into this area should be given high priority (Hampson & Brandon 2004). Productivity gains from an improved regulatory system have been estimated in the hundreds of millions of dollars (ABCB 2003).

In relation to OH&S, the National Research Centre for OHS Regulation (2002, ¶24) notes that the “most notable conclusion that emerges from an overview of the Australian OH&S legislation is its lack of uniformity”. Likewise, the Cole Royal Commission (2003) singled out the occupational health and safety (OH&S) in the construction industry as an area needing concerted effort to improve the conditions of workers, including the need to develop a consistent national regulatory framework. Despite numerous industry submissions advocating a national OH&S system, Cole (2003), however, felt that there was little prospect of the development of a national framework, apart from through the development and adoption of national OH&S standards.

This report examines four attempts to improve the harmonisation of OH&S regulation in Australia:

- The first is the *Occupational Health and Safety Act* 1991 (Commonwealth) which enabled certain organisations to opt out of state based regulatory regimes.
- The second is the development of national standards, codes of practice and guidance documents by the National Occupational Health and Safety Council (NOHSC). The intent was that these documents would be adopted by state and territory governments into their legislation and policy, thereby promoting regulatory consistency across Australia.
- The third is the attachment of conditions to special purpose payments from the Commonwealth to the states, in the form of OH&S accreditation with the Office of the Federal Safety Commissioner.
- The fourth is the development of a voluntary code of practice or national guidelines for best practice for construction safety by the industry itself.

This report examines and evaluates each of these attempts to promote consistency across Australia. It concludes that while there is a high level of information sharing between jurisdictions, particularly from the NOSH standards, a fragmented OH&S policy framework remains in place across Australia. The utility of emergent industry initiatives such as a voluntary code of practice to enhance consistency are discussed. First, a broader discussion about achieving consistency in federal systems of government is required in order to properly frame and evaluate the initiatives under examination in this report.

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## 2. UNDERSTANDING AUSTRALIAN GOVERNMENTS

Under the Constitution, the Australian states joined together to form one indissoluble Commonwealth – a **federation of states**. A federation is a form of government in which power is divided between national governments and smaller regional governments, often referred to as states. This arrangement combines “strong constituent units of government, each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of its legislative, administrative and taxing powers, and each directly elected and accountable to its citizens” (Watts 2001, 24 – 26).

A federation should be distinguished from a confederation which is a union of independent states which retain their independence, and a unitary form of government, which has a strong central government, and regions established for administrative convenience. In federations the federal and regional governments are both independent and coordinated (Wheare 1963). It has been argued that “The jurisdictional contours of a federation rarely make political sense, conform to a rational or organisational logic, or are economically advantageous. They simply exist as an ongoing set of inherited but continually adapting practices and provisions” (O’Faircheallaigh, Wanna & Weller 1999, 98). In this sense federations are instrumental arrangements which are designed to help make fragmented or disparate government entities work by adapting, adjusting and consolidating to deliver mutual benefits for all participating governments (O’Faircheallaigh, Wanna & Weller 1999, 100).

Under a federal system, powers are divided between a central government and several regional governments. In Australia, power was divided between the Commonwealth Government and the governments of the six colonies, which were renamed 'states' by the Constitution. Specific areas of legislative power ("heads of power") were given to the Commonwealth Government, including:

- taxation
- defence
- foreign affairs
- postal and telecommunications services (Australian Government 2005)
- The Commonwealth also has power to make laws for Australia's territories. <sup>1</sup>

The states retained legislative power over all other matters that occurred within their borders, including:

- police
- hospitals
- education
- public transport (Australian Government 2005).

Mutuality, reciprocity and exchange are concepts which reinforce the concept of federalism Chapman (1989, 57). Nevertheless there has been considerable tension between the various spheres of government, as the wording of the Constitution has often created situations where both the Commonwealth and the states claim the authority to make laws over the same matter (Australian Government, 2005).

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<sup>1</sup> A complete list of Commonwealth heads of power is at section 51 of the Constitution.

Federal systems of government require ways of delineating responsibilities between the different arenas as the basis of a federal system is to ensure sharing of power between the different levels of government rather than concentrating power in just one tier of government. Notwithstanding this focus, however, the main trend in cooperative federalism is argued by some authors to be increasing centralism and growing power of the Commonwealth at the expense of the states (O’Faircheallaigh et al, 1999). Part of the reason for this situation is the desire for national coherence in a range of policy areas. The High Court of Australia has also made a number of judgements which have increased the power of the Commonwealth at the expense of the states on a range of issues, which has been further enhanced by the increased revenue from the GST (Fenna 2004, 172). In particular, in the Roads Case of 1926, the High Court found that the Commonwealth could attach conditions to the granting of money, no matter how invasive these conditions might be for the states (Fenna 2004). Further, the federated structure of government means that policy formulation and implementation is a complex set of interrelated actions between actors:

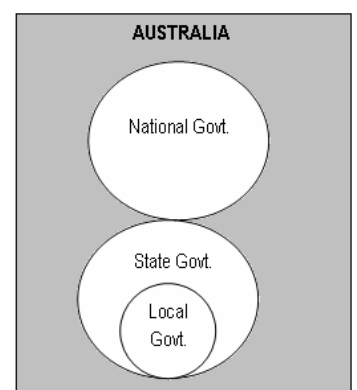
In federations multiple governments fragment policy processes and contribute a further set of complications or opportunities for public sector management. Policy must be negotiated between and across different levels of government, vertically between Commonwealth, state and local governments, and horizontally between states or local authorities. (O’Faircheallaigh, Wanna & Weller 1999, 97).

## 2.1 Intergovernmental Relationships

Policy analysts who examine intergovernmental relationships have tended to focus on hierarchical models of relationships between governments (Chapman 1989, 61). This is not the only model for federal government arrangements, however. A useful set of models have been advanced in the academic literature which are outlined below. The circle in each model indicates the area of responsibility of each sphere of government. All the figures are based on those initially developed by Wright (1978, 20).

Model 1 can be described as a separated authority model, with sharp distinct boundaries between the national and state governments (Wright 1978). Under this model, both state and commonwealth govern within their sphere of authority. This may have been the intention of the framers of the Australian constitution, which sought to differentiate the roles and powers of state and federal governments. This model has been strongly undermined in recent years, as it can be challenged in areas where there is overlapping authority. Under this perspective, local governments are seen as “creatures of the state subject to creation and abolition at the unfettered discretion of the state (barring constitutional limitations)... localities are mere tenants at the will of the legislature” Wright (1978, 21). In those areas where there are distinct and discrete spheres of authority, this model of viewing federal systems of governments may have value, although the perspective assumed in this model on the role of local governments is not one likely to be welcomed by local governments themselves.

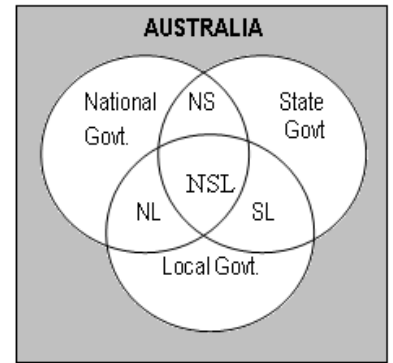
**Figure 2.1 Model #1 - Separated Authority Model**



**Figure 2.2 Model #2 - Overlapping Authority Model**

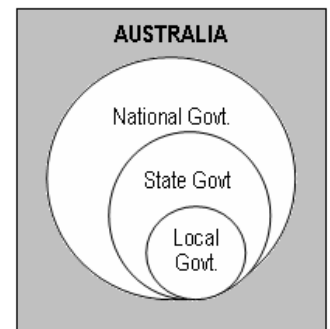


Model 2 is an overlapping authority model, where there is a balanced set of negotiated actions between the three spheres of government (Wright 1978). Each has autonomous spheres of action, however, most of the policy environment involves simultaneous action by multiple policy actors from multiple spheres of government all at the same time, and the power and influence of any one sphere is somewhat limited, due to the existence of the other spheres. This may be a more appropriate model of seeing federations as it acknowledges the “increasing interdependence of, and interaction between, policy making process in a political system characterised not only by a very high degree of horizontal (functional) differentiation and specialisation, but also by the institutional separation of vertical levels of federal, state and local governments” (Scharpf, 1978 cited in Chapman 1989, 62). Under this view, local governments are seen as valid players with distinct and related roles to both state and national governments. In practice this view leads to a set of intergovernmental relationships that could best be described as bargaining, or negotiated between all three spheres of government.



Model 3 is an inclusive authority model with diminishing circles of power and responsibility for each level of government (Wright 1978). If a government wanted to expand its area of influence, then either it can expand its own circle, or diminish the circle(s) of other government(s). Where a national government enacts legislation aimed at overriding state legislation, then the national government has effectively gained power, at the expense of the state governments, which have lost power. An alternative is to increase the size of the circle, without necessarily diminishing the size of the other spheres of government. This happens when the national government successfully raises more money and gives this to the states in the form of tied grants that place conditions on the states if they accept the grants. While these conditions could be seen as losses, the gains are often perceived to outweigh the losses and every sphere of government can achieve ‘wins’ over all.

**Figure 2.3 Model #3 - Inclusive Authority Model**



So which model best describes the situation in Australia at the moment? Federal systems of government can be viewed in a variety of ways. Parkin (2003) argues a situation close to the first model in that there are distinct areas of involvement for the different spheres of government, with state governments seen as essentially governments of **provision**, whereas the Commonwealth government is primarily that of **decision making** and **finance**. Alternatively, the debates over Industrial Relations regulation and the situation of increasing reliance by the states on federal funding, leads some commentators to argue the current situation is closer to the third model, with the Commonwealth seeking to expand its influence at the expense of the states (Hamill 2005).

While arguments could be put for all of the models described above, we suggest that the overlapping model best describes the policy situation affecting construction in Australia. While the first and last model could be argued to exist for specific policy areas, the second model would appear to be the best at depicting the current policy in the Australian federal system at the moment particularly as construction is an area in which overlapping jurisdiction is apparent. This fragmentation has obvious issues

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for attempts to achieve consistency between jurisdictions particular where there is overlapping regulations.<sup>2</sup>

## **2.2 Cost of overlap in regulations**

The design and construction market as a whole is valued at over \$40 billion per annum nationally (ABCB 2003). Over half of this building work is conducted across state borders. The lack of coordination between Commonwealth and state governments on construction regulations and policies is argued to negatively impact innovation (Manley 2004) and productivity (Productivity Commission 2004) in Australia. There is both quantitative and qualitative evidence that the Commonwealth is increasing the amount of regulation in all areas, with the Industry Commission reporting that the number of pages of legislation passed is doubling approximately every ten years (Fenna 2004, 99). Thus the lack of coordination between spheres of government, and the consequent deleterious affects on productivity and innovation in the sector have been well documented. The lack of coherency between local governments on processes such as development assessment (Productivity Commission 2004) is also seen to negatively impact upon the productivity of the industry.

Manseau and Seaden (2001) argue that in countries with a strong centralised government structure, such as the United Kingdom and Finland, a single government department is able to champion innovation in industries such as construction. However, in countries with a federal system of government, like USA, Germany or Australia, there are a variety of agencies all dealing with aspects of a given industry, with resulting overlapping regulations (Manseau & Seaden 2001, 17). In countries with centralised governments, government policy and actions are often seen as leading and promoting innovation. In contrast, in countries with federal government structures, innovation is assumed to occur due to opportunities created by competitive forces in the marketplace without the intervention of government, with the public sector often viewed as being conservative and as building barriers to innovation (Manseau & Seaden 2001, 17). Price Waterhouse Coopers (2002) argue in contrast that government can enhance innovation as a client, as a regulator, as an educator, and as a custodian of the business environment.

Geiger and Hoffman (1998) have noted that the extent of regulation in an industry tends to be negatively associated with firm performance. The cost of complying with variations in regulations between the states has been estimated by the Building Product Innovation Council (2003) as being up to \$600 million per annum for the building product manufacturers alone. Industry in Australia has consistently held that regulations inhibit innovation (Manley 2004).

The review above therefore raises questions therefore as to how Australian governments can achieve consistency in federal systems of government that are examined in the next section.

## **2.3 Mechanisms for achieving coordination in federal systems of government**

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<sup>2</sup> For a more detailed outline of the regulations affecting the construction industry in Australia, please see "Mapping the Regulatory Environment: An analysis of legislation affecting the construction industry in Australia."

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Harmonisation offers that the differences in laws and policies between two jurisdictions should be reduced by adopting similar laws and policies (Leebron 1997). Harmonisation can be in the form of specific regulations – both inputs and outputs; it can facilitate more general policy objectives focussing on guidelines (eg. Goals for pollution); there can be agreement on certain principles; and lastly, harmonisation of structures or procedures, usually to reinforce other types of harmonisation. Harmonisation is only possible if states converge around one commonly agreed standard (Fox 1992).

Majone (1998) argues that within harmonisation, or coordination, there are a number of different levels. Optional harmonisation aims to guarantee the free movement of goods and services, while permitting states to retain their traditional forms of regulation. Minimum harmonisation is where all governments agree to a specific set of minimum standards in regulations, but individual states are able to set higher standards individually (Majone 1998, 313). This case has also been referred to as the 'race to the bottom' in Europe as governments resort to the lowest common denominator in order to gain agreement of all parties (Leebron 1997).

The best known example in Australia of harmonisation is the Building Code of Australia which seeks to set a minimum standard of performance for buildings and building materials across Australia. This approach is not the only option, with the range of possible options outlined below. This range of options is useful to consider when contemplating how to achieve increased coordination in specific areas between governments.

Cooperative agreements are formal arrangements where two or more governments agree to work together. Such agreements include contracts, written undertakings and agreements on similar policies (Opeskin 2001). Informal arrangements typically take place within specific portfolios (eg. Australian Procurement and Construction Council, and numerous ministerial councils) and range from conversations to intergovernmental committees (Opeskin 2001). There are a large range of intergovernmental committees which seek to develop solutions to share information. These arrangements have been referred to as either 'iron rods' due to the constrained and focussed nature of the interactions, or 'threads of gossamer' which emerge through intergovernmental relations managers with a wide focus and interaction (Chapman 1989, 55).

Difficulties can arise from these intergovernmental committees however, as a state parliament is not legally bound by an intergovernmental agreement to enact legislation or to introduce new policy to implement a uniform scheme (Farina 2004). In practical terms, particularly if there is a financial grant being given by the Commonwealth, there is often strong incentive to pass the bill on implementing policy effectively endorsing the agreement.

There are a number of ways in which harmonisation can be achieved between various jurisdictions in a federated structure. A limited number of ways of achieving harmonisation between various jurisdictions in a federated system of government can be identified from the literature which are summarised in Table 2.1 below. The options below have been listed in order from most coordinated to least coordinated.

Table 2.1 Mechanisms for Harmonising Regulations in Federal Systems of Government <sup>3</sup>

Option 1 - Most coordinated	<i>Unilateral Exercise of Power by the Commonwealth</i>	Creating uniformity in regulation in Australia by Commonwealth legislating in such a way as to over-ride all similar state and territory regulations. For such an approach to work, legitimate authority in the constitution, termed a 'head of power', needs to be determined. As the Commonwealth lacks head of power for OH&S this option is difficult to enact, although the Commonwealth can attach conditions to funding to the states, such as it has done through Workchoices legislation.
Option 2	<i>Reference of Power to the Commonwealth</i>	The states can elect to refer a state power to the Commonwealth under the Constitution. If a 'matter' is referred to the Commonwealth by a state, the Commonwealth is then able to legislate. The Commonwealth government attempted this recently when it requested that the states refer workplace relations powers to the Commonwealth. This attempt failed when the "states advised that they will not refer their [industrial relations] powers" (COAG Communiqué 2005) to the Commonwealth. Cole (2003) suggested this was also unlikely to occur for OH&S regulation.
Option 3	<i>Incorporation by Reference</i>	The incorporation by reference application is where the various parliaments <b>adopt</b> the legislation of a single jurisdiction as amended from time to time in accordance with an intergovernmental agreement (Saunders 1994, 8). The advantage of this form of coordination is that there is need to only change a single piece of legislation, rather than several pieces of legislation although it requires extensive consultation. The <i>Building Code of Australia</i> could be considered an example of this. This option was endorsed by Cole (2003) as the most viable for the construction industry.
Option 4	<i>Complementary or Mirror Legislation</i>	This option requires that the Commonwealth and states work together to achieve legislative coverage of a particular policy area, particularly where there are dual, overlapping to uncertain division of constitutional powers. In these instances, each jurisdiction enacts laws to the extent of its constitutional capacity and the matter is addressed by the participation of all of the legislatures of the Federation. "The Commonwealth and all participating states would pass separate, but totally consistent (although not necessarily identical) pieces of legislation" (Allen Consulting Group 2002, 40). An intergovernmental agreement is normally required to set out the terms and conditions of the arrangement.
Option 5 – moderately coordinated	<i>Mutual Recognition</i>	Under mutual recognition, the rules and regulations of other jurisdictions are recognised. Mutual recognition enables goods or services to be traded across jurisdictions, and means that if the goods or services comply with the legislation in their own jurisdiction, and then are deemed to comply with the requirements of the second jurisdiction, or pathways for achieving compliance are clearly established. Mutual recognition is a one of the vehicles governments can utilise to reduce the regulatory impediments to goods and services mobility across jurisdictions (Productivity Commission 2003).
Option 6	<i>Agreed Legislation or Policies</i>	This mechanism is where governments in question agree to implement similar legislation or policies, which are then implemented locally, although policy is not legislated.

<sup>3</sup> The content of this table is sourced from Allen Consulting Group (2002), Farina (2004), and Opeskin (2001)

Option 7	<i>Adoptive Recognition<sup>4</sup></i>	A jurisdiction recognises that the decisions of another jurisdiction meet the requirements of its own legislation regardless of whether this recognition is mutual.
Option 8	<i>Non-Binding National Standards Model</i>	A national authority makes decisions which are adopted to various extents by the respective state or territory ministers.
Option 9	<i>Exchange of Information</i>	Such an exchange can take many forms, including where meetings between Ministers and/or public servants occur on a regular basis to exchange information; or where best practice guidelines or demonstration projects are published with the intention that they will be adopted by other jurisdictions.
Option 10 - uncoordinated	<i>Independent Unilateralism</i>	Under this option each jurisdiction goes its own way – so there is no coordination at all between governments. Unlike option one, this option means that the states and the commonwealth all act in an uncoordinated way and pursue disparate policy objectives.

The set of mechanisms in Table 1 is advanced in this paper as a means to evaluate attempts to improve the consistency of OH&S regulation in Australia. As will be demonstrated below, such a framework for analysis becomes very useful in examining specific attempts to harmonise regulation.

Whatever the method, there have been concerted attempts to improve the harmonisation of OH&S regulation in Australia which are reviewed in the next section.

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<sup>4</sup> The content of this table is sourced from Allen Consulting Group (2002), Farina (2004), and Opeskin (2001)

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### 3. ATTEMPTS TO HARMONISE OH&S REGULATION IN AUSTRALIA

In regard to occupational health and safety, there are ten principal OH&S statutes across Australia. Each of the states and territories has their own OH&S legislation, while the Australian Government has two main pieces of OH&S legislation, one relating to Commonwealth employees and the other to the maritime industry. As noted in the introduction, the reason for the multiplicity of these statutes is that the Australian Constitution does not give the Commonwealth Government the right to legislate on OH&S for all Australians, meaning that each of the states, territories and the commonwealth, all have separate regulations for OH&S in Australia (Clayton, Johnstone and Sceats 2002). Additionally, some states have specialty OH&S statutes for the mining industry. The *Occupational Health and Safety (Commonwealth Employment) Act 1991* is the legislation of interest in this report. There have been various calls to improve the harmonisation of OH&S regulation, given that there are effectively 10 OH&S statutes in Australia .

The first attempt to be examined stems from the *Occupational Health and Safety Act 1991* (Commonwealth) which enabled certain organisations to opt out of state based regulatory regimes. The second is the development of national standards, codes of practice and guidance documents by the National Occupational Health and Safety Council (NOHSC). The intent was that these documents would be adopted by state and territory governments into their legislation and policy, thereby promoting regulatory consistency across Australia. The third is the attachment of conditions to special purpose payments from the Commonwealth to the States, in the form of OH&S accreditation with the Office of the Federal Safety Commissioner. The fourth is the development of a voluntary code of practice or guidelines for achieving best practice for construction safety by the industry itself.

As an interesting aside, the tempo of many of these activities has increased, following the release of the Cole Royal Commission Report in 2003, which argued for a number of the initiatives outlined in this report (see Appendix B for an overview).

This paper examines and evaluates each of these attempts to promote consistency across Australia. It concludes that while there is a high level of information sharing between jurisdictions, particularly from the NOSCH standards, a fragmented OH&S policy framework remains in place across Australia. The utility of emergent industry initiatives such as a voluntary code of practice to enhance consistency are discussed.

#### 3.1 'Opting out' – the Comcare self-insurance scheme

In Australia, each state and territory has its own workers' compensation scheme. The same is also true for the Commonwealth. Under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act), Comcare was established as the agency responsible for the administration of the Commonwealth workers' compensation scheme. Cole (2003) felt that it was highly unlikely that a national uniform set of regulations could be enacted in the area of workers compensation, due to differences between the states.

In 1992, the Commonwealth workers' compensation scheme was amended and made available to a limited range of private sector corporations. The SRC Act enables eligible private employers to apply for a licence to self-insure and manage

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their workers' compensation liabilities. Pursuant to Part VIII Section 100 of the SRC Act, employers eligible for a licence under the Comcare scheme are those who carrying on a business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority. The Minister for Employment and Workplace Relations can issue an eligible applicant a licence. In 2004, Optus Administration Pty Ltd (Optus) was granted such a licence, being that the corporation is competitor of Telstra Corporation Ltd. Further licenses have been granted to businesses such as K & S Freighters Pty Ltd, Linfox Australia Pty Ltd and John Holland Pty Ltd.

### **3.1.1 The Productivity Commission Report**

Due to the lack of harmony among the states, territories and Commonwealth regarding workers' compensation schemes and OH&S regulatory regimes, the Australian Government's Productivity Commission conducted an inquiry and prepared a report to develop and assess possible models for establishing national frameworks for them. In the report, *National Workers' Compensation and Occupational Health and Safety Frameworks* (Australian Government 2004a), the Commission accepted the case for some form of government intervention to enhance these program's outcomes.

The Commission recommended that the Commonwealth "immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme, subject to meeting its prudential, claims management, occupational health and safety and other requirements" (Australian Government 2004a, 149). In its response to the report, the Australian Government supported this recommendation to the extent that they are currently meeting their legislative duty to consider applications based on their merit (Australian Government 2004b, 9).

Additionally, the Commission inquiry report concluded that there are no compelling arguments against a single national OH&S regime, while there are significant benefits to be obtained from a national approach (Australian Government 2004a, xxiii). They recommended that the Commonwealth "amend the *Occupational Health and Safety (Commonwealth Employment) Act* 1991, to enable those employers who are licensed to self-insure under the Australian Government's workers' compensation scheme to elect to be covered by the Australian Government's occupational health and safety legislation. This legislation would be extended to cover those insuring under any future alternative national premium-paying insurance scheme" (Australian Government 2004a, 103). In its response, the Australian Government's agreed that OHS (CE) Act should be amended to require coverage of non-Commonwealth employers who gain a self-insurance licence under the *Safety, Rehabilitation and Compensation Act* 1988 (Australian Government 2004b, 8-9).

### **3.1.2 OH&S and SRC Legislation Amendment Act 2006**

In response to the Productivity Commission report, the *OHS and SRC Legislation Amendment Act* 2006 came into effect. Two notable changes that came about due to the amendments are:

- 1) the *Occupational Health and Safety (Commonwealth Employment) Act* 1991 was renamed the *Occupational Health and Safety Act* 1991 (Cth), therefore the act is no longer limited to Commonwealth employees, and

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2) any private corporation granted a licence to self-insure under the Comcare scheme is also covered under the Commonwealth OH&S scheme.

Majority senators for the amendments concluded that Commonwealth involvement in regulation of occupational health and safety is an important policy development that will provide competition for state OH&S regimes and workers' compensation schemes. In time, they believe the changes will introduce more rigorous application of OH&S principles and practices (Senate Committee 2006, 6-7). In contrast, the opposition senators agreed with the argument put forward by unions that the standards enforced by Comcare are not as stringent as those which operate under state jurisdictions, thereby potentially lowering the standard of OH&S for some corporations (Senate Committee 2006, 10). Additionally, the opposition was concerned about the potential for employees working side by side performing the same job, yet being subject to two different OH&S standards, one covered by Comcare and one covered by the state jurisdiction (Senate Committee 2006, 13).

### **3.1.3 Attorney-General (Vic) v Andrews [2007]**

Under the SRC Act, Victorian based Optus was granted a license to self insure under the Comcare scheme, which meant that, as of 30 June 2005, the corporation was not subject to the laws of a state or territory relating to workers' compensation.

The Attorney-General of Victoria, on behalf of WorkCover Victoria, initiated proceedings in the Federal Court seeking declarations that the licence granted to Optus was invalid and that the relevant provisions of the SRC Act were beyond the legislative power of the Commonwealth. A constitutional challenge was mounted by the State of Victoria and supported by New South Wales, South Australia and Western Australia, but failed by a 5:2 majority. On 21 March 2007, the High Court held that the licensing provisions were a valid exercise of the corporations power in section 51(20) of the Constitution, and were not to be regarded as law about State insurance (High Court of Australia 2007a). The High Court found that the licensing provisions of the SRC Act are valid, and Optus is no longer under obligation to comply with the requirements of compulsory WorkCover insurance under the Victorian scheme.

### **3.1.4 Employer advantage**

The High Court ruling may encourage other multi-jurisdictional, private employers to consider opting-out of State/Territory workers' compensation schemes. There appear to be both administrative and financial advantages for eligible employers to move to the Comcare scheme. Employers operating in more than one jurisdiction will be dealing with one agency in regard to workers' compensation, rather than up to eight agencies, as in the case of a truly national company. Financially, employers can expect to pay reduced premiums when self-insuring. Optus told the High Court that it expected to save \$186,000 per month, or over \$2 million per year, on premiums by moving from Victoria's WorkCover scheme and into the Comcare scheme (High Court of Australia 2007b).

It appears that large national employers may opt for the Comcare option if provided with the ability to operate under one uniform workers' compensation scheme and OH&S regime. The Comcare scheme is likely to reduce the amount of time and resources utilised attempting to ensure compliance with separate requirements of each state and territory in which they operate.



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### **3.1.5 State and territory viewpoint**

While the Commonwealth and eligible employers may be satisfied with the amendments to the SRC Act and the High Court ruling, it appears as though the states and territories may not be so content. As mentioned earlier, the court case was mounted by the State of Victoria and supported by New South Wales, South Australia and Western Australia.

There is some concern that Comcare will not have the resources available to regularly inspect workplaces under its jurisdiction and those companies will have lower occupational health and safety standards than their neighbouring workplaces. Victorian WorkCover Minister, Tim Holding, stated recently that Comcare licensed workplaces in Victoria will not be subject to the same level of scrutiny as other Victorian workplaces because the Commonwealth regulator has too few inspectors (Australian Broadcasting Company 2007).

Barbara Bennett, who was Comcare Chief Executive at the time, disagreed with Mr. Holding. She said Comcare is dealing with very large, sophisticated employers in its jurisdiction, and “because of the work we do with them in making sure their systems are in place and regular auditing, we don’t need to use a parking inspector approach to safety” (Australian Broadcasting Corporation 2007).

Additionally, some concern has been raised that state and territory workers’ compensation schemes may suffer financially due to lost premiums without appropriate “exit” arrangements if many large, private companies opt-out of their schemes. Smaller schemes such as the ACT, Tasmania and the Northern Territory may be most vulnerable. The Productivity Commission Report stated, “Some of the smaller schemes may ultimately become unviable on a stand-alone basis if a significant number of employers move to a national scheme (Australian Government 2004a, 134).

One response to the above concern came from Hon Kevin Andrews MP, Minister for Employment and Workplace Relations. He stated that rather than complain, the onus is on the states to work together and provide incentive for companies to stay in their workers’ compensation schemes, rather than leave for the Comcare scheme. “The message to the states and territories is clear - They can either get out of the way or be part of the solution” (Andrews 2005a).

### **3.1.6 The current status of Comcare Licences**

In light of the recent amendments to the SRC Act, the High Court case ruling, and political party interest in the issue, the Comcare scheme has been on the forefront of the political agenda. It is apparent from licences granted, that opting-out of state and territory workers’ compensation schemes is on the uptake by private employers (see Appendix B, section B.2). In 2005, Optus was granted the only licence to self insure under Comcare. In 2006, three licences were granted (K&S Freighters Pty Ltd, Linfox Armaguard Pty Ltd and Linfox Australia Pty Ltd), while thus far in 2007, six licences have been granted (Chubb Security Services Ltd, three divisions of John Holland Pty Ltd, National Australia Bank Limited and National Wealth Management Services Limited)(Comcare 2007).

Additionally, there are seven licence applications under review by the Minister at the time this manuscript was prepared. Under Section 100 (c) of the SRC Act, there are five applicants claiming that they are “carrying on business in competition with a Commonwealth authority or with another corporation that was previously a

Commonwealth authority”, namely Border Express Pty Ltd, Chubby (?XX) Security Personnel Pty Ltd, and three divisions of Toll Pty Ltd. Additionally, there are two organisations applying for licences under provision (a) that are, or about to cease being a Commonwealth authority. These are Medibank Private Limited and Snowy Hydro Limited (Comcare 2007).

### 3.1.7 Summary – Effectiveness of Comcare self-insurance scheme

Currently take up of the scheme is quite low in the construction industry, with only one major company making application under the scheme (John Holland). Large construction firms may have waited until the High Court case was resolved until applying to participate in the scheme. Consequently, there has been very little uptake of the opportunity afforded by this legislation to date in the construction industry. Nevertheless, there is potential here for this to occur, particularly now that the court case has been completed. At this stage, the level of harmonisation is ‘independent unilateralism’, as each jurisdiction has its own legislative arrangements. The potential is that this could be much higher if the majority of construction firms opt out of state based schemes. If this happens on a significant level, it may result in the state based systems being unviable or state-based systems may opt to mirror each other.

Using the harmonisation methods highlighted at the start of the report (Table 2.1), the Comcare initiative could be seen as:

**Figure 3.1 Level of harmonisation achieved by Comcare**

Unilateral Exercise of Power by the Commonwealth
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
Non-Binding National Standards Model
Exchange of Information
<b>Independent Unilateralism</b>

## 3.2 Harmonisation through National Standards: National Occupational Health and Safety Council

### 3.2.1 Background

The National Occupational Health and Safety Commission (NOHSC) was established on 11 October 1984 on a non-statutory basis. The following year, the *National Occupational Health and Safety Commission Act 1985* (NOHSC Act) established NOHSC as a statutory authority under section six of the act.

When NOHSC was established, two of the top priorities for the Commission were the development of a uniform legislative approach to occupational health and safety and

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the development of national standards, while the role of the Commonwealth was primarily one of coordination and facilitation (Parliament of Australia 2005, ¶12).

In 1991 NOHSC established a tripartite National Uniformity Taskforce which identified priority areas for achieving national uniformity. Under this taskforce, NOHSC developed standards for plant, certification of users and operators of industrial equipment, workplace hazardous substances, occupational noise, manual handling and major hazardous facilities (National Research Centre for OHS Regulation 2005, ¶12). The standards were inconsistently adopted into regulation by the states and territories, while some were adopted in the form of codes of practice. Part of the reason for this was the cooperative approach undertaken by NOHSC (Johnstone 2004, p.97).

By mid-1996, the new Howard government declared a change of strategic direction for NOHSC. The Committee's new focus would be on the OH&S needs of small business, and there was to be less emphasis on the development of national standards (Parliament of Australia 2005, ¶14-15).

Shortly thereafter, NOHSC became responsible for the development and implementation of the National OHS Strategy 2002-2012 (NOHSC 2002). In the Strategy, one of the nine areas for national action listed is a 'nationally consistent government framework', which included the monitoring, reviewing and developing of national standards (NOHSC 2002, p10-11). Since 2002, there have been four national standards and six national codes of practice developed by NOHSC (ASCC 2007a).

The decreased emphasis on setting national standards by NOHSC was noted in 2003 when the Royal Commission into the Building and Construction Industry final report was issued. Part of this was a shift from attempting to achieve national uniformity, and replace this with consistency between jurisdictions (Australian Government 2004a). The Royal Commission recommended that the Commonwealth take steps to ensure that national standards were developed for the building and construction industry, and also recommended a timetable for completion of these tasks be drawn up (Cole 2003, p 28). In 2005, the National Standard for Construction Work [NOHSC:1016] was developed.

Also during 2005, the Australian Safety and Compensation Council (ASCC) succeeded NOHSC. At the time, the Minister for Employment and Workplace Relations, Hon Kevin Andrews stated, "The ASCC will establish a national approach to workplace safety and workers compensation which currently does not exist in Australia...ASCC will be a forum for better national discussion and coordination while respecting states' jurisdictions over workplace safety and workers compensation" (Andrews 2005b).

While NOHSC was a Commonwealth Authority established under the now repealed NOHSC Act, the ASCC was established as an advisory committee under the executive power of the Commonwealth. This new arrangement could provide the Australian Government with more flexibility and less bureaucracy in regard to the ASCC. On the other hand, any changes to the ASCC powers and functions are not subject to the scrutiny of the parliamentary process.

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### 3.2.2 Current status of NOHSC standards as a harmonisation mechanism

The uptake by states and territories of national standards has typically been reported as quite high (ASCC 2006a, 61-63). The authors reviewed the uptake into legislation of NOHSC standards by the states and territories, and takes a different position to this – primarily due to way ‘adoption’ is defined in this paper.

As noted in Table 1 various levels of harmonisation are possible. Ideally, a national standard would be incorporated by reference into legislation (Option 3 in Table 1) – that is the standard is adopted by state legislation and thereby becomes law. This is arguably what was intended by the development of the standards in the first instance, as ASCC (2006c) notes:

The National OHS standards and codes of practice are not legally enforceable unless State and Territory governments adopt them as regulation or codes of practice under their principal OHS Acts.

This is reinforced by various state authorities. For example, Court (2007) recently reminded the ASCC that construction firms “have obligations under State OHS law, but no obligations under the National Standard”. This is because the standard only becomes law, if incorporated by reference into the state or territory laws.

However, as Table 1 demonstrates, it is possible for states to adopt a national standard at a lower level than by direct incorporation by reference in legislation. Some of these include:

- Adoption of the national standard into policy, not regulation, for example as a code of practice. This could mean that the standard is not law, but provides advice on how to comply with the law.
- Adoption of key elements of the standard into the text of legislation, without reference to the specific standard itself. This would mean that the standard provides information which is incorporated into law.
- Replacement of key elements of the national standard with state codes or standards, where the standard is not incorporated into legislation, nor referred to in state legislation.

By differentiating the level of ‘adoption’ we argue that uptake of standards certainly occurred, but that this uptake was generally at a lower level of harmonisation than incorporation by reference – or adoption of the standard into law. Often times, the standards were referenced in guidelines or on OH&S websites. In other instances, the standard was re-written as a state code of practice. A full break down of the adoption of NOHSC standards can be found in Appendix A.

Four examples of how the term adoption can be examined more explicitly is shown in Tables 3.1 through 3.4. In these tables the status of four national standards relevant to the construction industry, namely plant, noise, manual handling and construction work are examined. This does not mean that the state based standards and codes of practice are incompatible with the national code, just that the national code has not been adopted on an ‘as is’ basis.

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**Table 3.1 National Standard for Plant [NOHSC:1010 (1994)] As at 1 November 2007**

<b>Jurisdiction</b>	<b>As reported by ASCC (2006b)</b>	<b>As found by authors</b>
<b>ACT</b>	Adopted as a code of practice	Adopted in legislation
<b>NSW</b>	Most of key elements adopted	Referenced in Work Cover Guide
<b>NT</b>	Most of key elements adopted	Referred to for further information
<b>QLD</b>	Adopted	Adopted in legislation
<b>SA</b>	Adopted	Referenced in Safe Work Guide in own legislation
<b>TAS</b>	Most of key elements adopted	Adopted in regulation
<b>VIC</b>	Most of key elements adopted	Replaced with state COP
<b>WA</b>	Most of key elements adopted	Replaced with State Code of Practice

With the National Standard for Plant there is evidently a differentiated approach to the adoption of the standard.

**Table 3.2 National Standard for Occupational Noise [NOHSC:1007 (2000)] As at 1 November 2007**

<b>Jurisdiction</b>	<b>As reported by ASCC (2006b)</b>	<b>As found by authors</b>
<b>ACT</b>	Adopted as a code of practice	Adopted in legislation
<b>NSW</b>	Adopted	Referenced in Work Cover Guide / COP
<b>NT</b>	Adopted	Adopted in legislation
<b>QLD</b>	Adopted	Replaced by State COP
<b>SA</b>	Adopted	Replaced by State COP (Work Cover Guide)
<b>TAS</b>	Most of key elements adopted	Referenced in Work Cover Guide
<b>VIC</b>	Adopted	Referenced in Health and Safety Guide
<b>WA</b>	Adopted	Referenced in State Code of Practice

With the National Standard for Occupational Noise, there is a differentiated approach to adoption, typically at a lower level of adoption than legislation.

**Table 3.3 National Standard for Manual Handling [NOHSC:1001 (1990)]** As at 1 November 2007

Jurisdiction	As reported by ASCC (2006b)	As found by authors
ACT	Adopted	Adopted in legislation
NSW	Adopted	Adopted in legislation
NT	Most of key elements adopted	COP Referenced in legislation
QLD	Adopted	Replaced by State COP
SA	Adopted	Replaced by State COP
TAS	Adopted	Adopted in legislation
VIC	Most of key elements adopted	Replaced by State COP
WA	Most of key elements adopted	Referenced in State COP

With the National Standard for Manual Handling there is evidently a differentiated approach to adoption.

**Table 3.4 National Standard for Construction Work [NOHSC:1016 (2005)]** As at 1 November 2007

Jurisdiction	As reported by ASCC (2006b)	As found by authors
ACT		Adopted in legislation
NSW		Topic referred to in state COPs
NT		Adopted in legislation
QLD		Adopted in legislation
SA		Being considered
TAS		Implied in work cover guide
VIC		Being considered
WA		New legislation will enact in 2008

No doubt the policy intent of NOHSC was to establish national standards which would be adopted (incorporated by reference) in legislation. This paper argues that in order for a standard to become law it needs to be specifically referenced in legislation. Clearly there are examples of this occurring with NOHSC standards. However, such an uptake is somewhat patchy, with evidence that adoption has sometimes occurred at a lower level than direct incorporation by reference into legislation itself. For a full list of the current status of the adoption of NOHSC standards please see Workplace Relations Ministers' Council (2006). Thus, using

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the definitions set out in Table 1, we argue that the NOHSCH standards are effectively non-binding national standards that have a mixed level of adoption into regulation (Figure 2).

### **3.2.3 Current ASCC Activity**

In 2006, the Council of Australian Governments (COAG) agreed to a new reform agenda, which contained a number of actions aimed at reducing regulatory burdens on industry. One of these regulatory “hot spots” was OH&S regulation. The report emphasised the need for the ASCC to reduce the time taken in developing national OH&S standards, to consult with states and territories to ensure agreement on nationally-consistent arrangements and to create specific time frames for implementation with each jurisdiction (COAG 2006, 40).

In April 2006, the Australian Government Productivity Commission report, *Rethinking Regulation* was released. The report highlighted the significance of OH&S regulation because it affects every workplace in Australia and it identified the lack of a coherent national approach to OH&S (Australian Government 2006, 36-37).

In response to the two reports, the ASCC developed recommended strategies for implementing reforms to improve the development and uptake of national OH&S standards, and to identify priority areas in principal OH&S Acts in each state and territory that should be harmonised (ASCC 2006c, 1). COAG endorsed a timetable and agreed that harmonisation of principal OH&S acts was essential to the uptake of national standards (COAG 2007, 4). In other words all states and the commonwealth, through COAG, are outlining a framework for the establishment of the national standards.

The culmination of these reforms is the preparation of the ASCC’s new National OHS Framework. The National Framework will consist of a handbook which assists ASCC to move forward with the agreed approach of the framework, a “core elements” document which provides the foundation for a harmonised system, declared national standards and codes, guidance material and regulatory interpretation documents. In August 2007, the ASCC endorsed an interim document that sets out the “common elements” of general duties of care for OH&S for the purpose of progressing work on national standards and codes under the new framework. Over time, this document will be replaced by the “core elements” document (ASCC 2007b, 3).

### **3.2.4 Summary – National standards as a mechanism for OH&S harmonisation**

Using the harmonisation methods highlighted at the start of the report in Table 2.1, an argument could be mounted that setting national standards in an attempt at OH&S harmonisation is an example of ‘incorporation by reference’, or as a non-binding national standards model. No doubt the policy intent was to set up a level of incorporation by reference and this is reflected in the various communiqués, which set out the extent of adoption. The critical issue here is the meaning of the term adoption. If it is taken in the sense argued in this report – adopted so that it becomes law, similar to the Building Code of Australia, then it would be possible to argue the case for this level of harmonisation. In fact, it appears that this is not the case, as there has not been widespread adoption of the standards into legislation. Instead there has been reference to the standards in sub-legislation – advisory notes, guides and so forth.

Likewise an argument could be presented that there could be ‘mirror legislation’, which again, is not the case as there are numerous differences in the level of

adoption of the various standards, with even the definitions under the state legislation varying significantly. Consequently, at best what can be argued is that the NOHSC standards are 'non-binding national standards' that have a mixed level of adoption into legislation or regulation. It remains to be seen what the outcome of the latest initiatives bring.

While it is acknowledged that the intent of the NOHSC standards was certainly to provide the mechanism for national OH&S consistency, given the patchy uptake of the standards to date, the current level of harmonisation can only be considered a non-binding national standards model.

**Figure 3.2 Level of harmonisation for NOHSC Standards**

Unilateral Exercise of Power by the Commonwealth
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
<b>Non-Binding National Standards Model</b>
Exchange of Information
Independent Unilateralism

### **3.3 Building and Construction Occupational Health and Safety Scheme – Using funding powers to achieve harmonisation**

#### **3.3.1 Background**

Like other reform initiatives the Cole Royal Commission recommended that the “Commonwealth government reform its procurement arrangements to ensure that proper attention is given to occupational health and safety” (Cole 2003, p.60). On 12 September 2005, the *Building and Construction Industry Improvement Act 2005* came into effect. Section 35(4) of the Act states “The Commonwealth or a Commonwealth authority must not enter into a Commonwealth building contract with a person or persons unless the person, or each of the persons, is an accredited person at the time the contract is entered into.” The Act is supported by two regulations, namely the *Building and Construction Industry Improvement Regulations 2005* and the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005*.

The Act provided for the establishment of the Australian Government Building and Construction Occupational Health and Safety (OHS) Accreditation Scheme (hereafter referred to as the Scheme) that applies to construction work procured by the Australian Government, and operates under the Office of Federal Safety Commission (OFSC). The Scheme was developed in order to allow the Government to use its purchasing power to influence change, and to champion a cooperative approach to improve OH&S performance in the industry. By acting as a model client, the



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Government aims to promote safe work, performed on time and on budget (DEWR 2007a). The Scheme reflects the Australian Government's commitment to the *National OHS Strategy 2002-2012*.

In order to obtain accreditation under the Scheme, head contractors must meet various criteria. For example, they must have appropriate OH&S policies, procedures and practices in place, and must agree to audits conducted by the Federal Safety Officers. Additionally, they must comply with reporting requirements and accreditation-related conditions imposed by the Federal Safety Commission.

In September 2007, the *Building and Construction Industry Improvement Amendment (OHS) Bill 2007* was passed, legislative amendments to the *Building and Construction Industry Improvement Act 2005*. The amendments included introduction of Stage Two of the Scheme, which took effect on 1 October 2007.

Initially, Stage One of the Scheme applied only to those contracts valued at \$6 million or more that were directly funded by the Australian Government. Stage Two of the Scheme lowered the threshold to include head contractors for Australian Government directly funded constructions projects valued at \$3 million or more. For indirectly funded work, the Scheme will apply where the value of the Australian Government contribution is at least \$5 million and represents at least 50% of the total value of the project; or the Australian Government contribution is \$10 million or more, irrespective of the proportion of Australian Government funding (DEWR 2007b).

It is important to note that Stage One of the Scheme applies not just to construction work carried out by firms contracted to the Commonwealth government, but also applies to any work which is funded directly or indirectly by the Commonwealth. That is, if the Commonwealth government provided funds to the state governments for specific projects, then compliance with the Scheme was required for those head contractors.

Stage Two of the Scheme extends the application of the Scheme to projects which are indirectly funded by the Commonwealth. This extension of the Scheme is significant implications for this report:

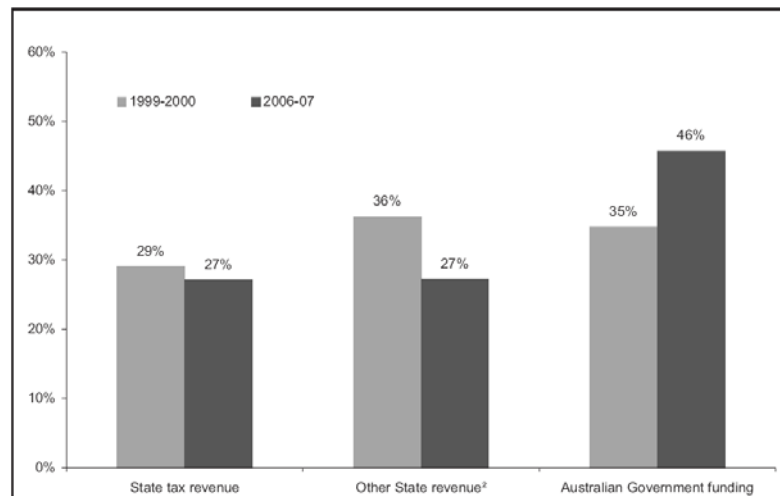
- a fundamental shift in federal funding arrangements
- the potential to include most government construction work in a single accreditation system

The key to understanding the issues involved in this scheme needs to be based in a discussion on federal funding arrangements.

### **3.3.2 Federal funding arrangements**

State governments have three main sources of revenue – state based taxes, other forms of state based revenue (e.g. royalties from mining), and Australian Government funding. Over time, the amount of funding from the Australian Government has steadily increased, particularly after the introduction of the GST, and the Intergovernmental Agreement (Intergovernmental Agreement 1998). This can be demonstrated in the following Figure 3.4:

**Figure 3.3 Revenue Sources - All states - 1999-2000 and 2006-2007 (Queensland Government 2006a, p.147)**



Funding provided by the Australian Government to the states and territories comes in two main forms – Special Purpose Payments and General Purpose Payments.

### **3.3.1.1 Special Purpose Payments (SPP)**

SPP are grants provided by the Australian Government to the states, for a particular purpose often with conditions attached. Major areas of SPP funding appear to be of health (including disability), education and roads (Parliament of Tasmania 2006). State governments have constitutional head of power for public works occurring within their jurisdiction. However, when the Australian Government provides financial grants to the states, it has the right to attach conditions to such grants. Specifically, the Australian Government: “may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit” (Australian Constitution – Section 96, Published by the Australian Senate 2003). The High Court of Australia in the *Main Roads Case*, which is notable for its brevity, upheld the right of the Australian Government to place conditions on funding provided to the states under this section of the Constitution (High Court of Australia 1926).

While acknowledging the right of the Australian Government to attach conditions to funding, some states argue that these conditions place limits on discretionary spending within the states:

SPP’s are usually determined through the Australian Government budget and normally result from specific fixed term funding agreements ... often states have to commit to matching these grants dollar for dollar, in order to receive the funding available. Conditions such as this reduce a state’s control over its’ own Budget priorities by limiting discretion as to how its financial resources can be applied. Consequently, all states are continually looking to remove such conditions from new or renegotiated inter-governmental agreements (Parliament of Tasmania 2006, p. 187).

Thus SPP’s are an important element in federal funding arrangements. While the High Court has upheld the right of the Australian Government to impose conditions

upon such funding, it has been argued that at least some states feel such arrangements limit autonomy, and are also concerned at increasing reporting requirements attached to such funding arrangements.

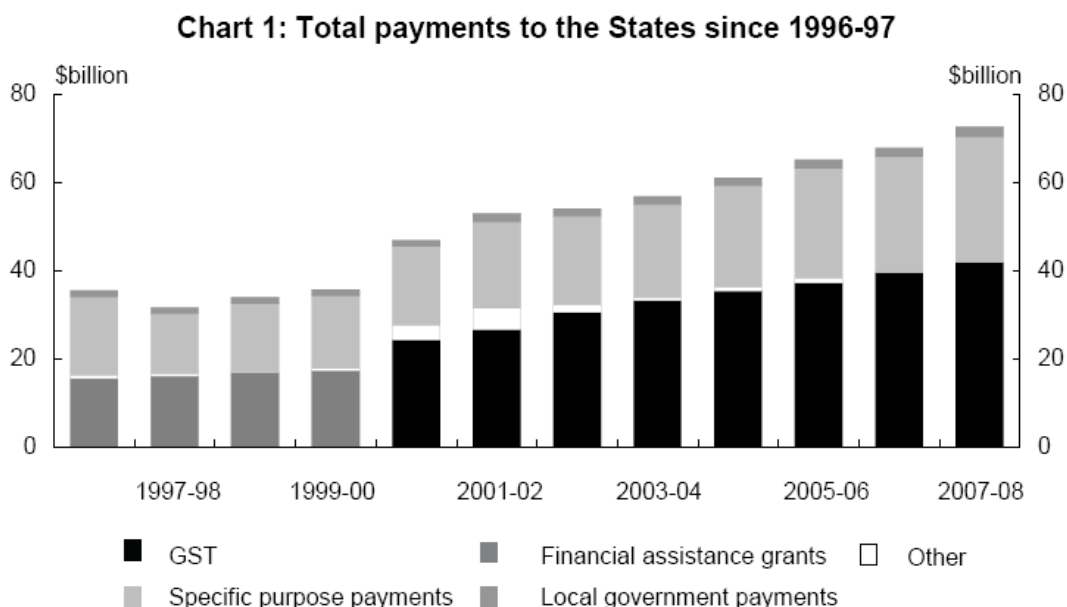
Stage One of the Scheme applied to these special purpose payments to the states, particularly Auslink funding and funding for schools and hospitals. The other significant form of income for the states is General Purpose Payments.

### 3.3.1.2 General Purpose Payments (GPP)

GPP are payments provided by the Australian Government to the states and territories, who are permitted to use this money for any purpose (Intergovernmental Agreement 1998, p.110). This is reiterated in state and territory budget papers. For example “Unlike SPPs, which must be spent in accordance with purposes agreed to between the Australian Government and the State (or as prescribed by the Australian Government), General Purpose Payments (GPPs) from the Australian Government can be applied at the State's discretion” (Parliament of Tasmania 2006, p.185). Likewise “General purpose payments are ‘untied’ and are used for both recurrent and capital purposes” (Queensland Government 2006b, p.160). Figure 3.5 (over the page) summarises the GPP payments to the states, and how these have increased over time.

It should be noted from these figures that the GPP payments have increased over time. Webb (2006) notes that most states have signed an undertaking to reduce their state based revenue in return for continued increase in payments from the GST revenue. If these undertakings are carried through by all parties, then GPP payments as a proportion of total state revenue will continue to increase significantly. Webb (2006) conjectures that those states which have not given an undertaking to reduce certain taxes will be forced to follow other states in order to provide a competitive environment for business.

Figure 3.4 Total payments to the states (Costello 2007, 6)



Overall, both GPP and SPP combine to provide very significant amounts of revenue for the states, although the percentage of total income varies from jurisdiction to

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jurisdiction. Figure 3.5 provides a useful indication of the funding arrangements and how these have increased over time.

The clear assumption from reviewing budget papers is that GPP funds are viewed by the state and territory governments as funds for their discretionary use, alongside state based revenue. This assumption appears warranted, given the wording of the intergovernmental Agreement. Such an understanding provides a couple of challenges to this research project, and to the proposed Stage Two of the OH&S Accreditation Scheme, particularly the attachment of conditions to GST discretionary funding. However while GPP are able to be used by the states as they see fit, the IGA does not preclude the Commonwealth from attaching conditions to GPP.

### **3.3.3 Attaching conditions to indirect funding of construction projects from GPP revenue**

As GPP payments are viewed as discretionary funds for the states, the states would argue that conditions cannot be attached to them by the Australian Government. To quote Peter Beattie, former Premier of Queensland:

I mean when I sat down and signed the GST deal with the Prime Minister and Peter Costello, the deal said – and the wording of it's very clear – that the states can use this for any purpose. We gave up untied grants, and they've been around since the states gave up their taxing power after World War II, we've given up a whole lot of taxes, this money is Queensland money. And we're gonna (sic) spend it in the areas where necessary (ABC Online 2005).

Stage Two of the OFSC Scheme may therefore be seen by the states and territories as the attachment of conditions to GPP funding. While the High Court has upheld the right of the Australian Government to attach conditions on SPP, it is not clear at this stage, whether this ruling would also apply to GPP, particularly when this funding is discretionary. Given that the High Court upheld the rights of the Australian Government under the Constitution to grant money to the states under such conditions as it sees fit, then this would be likely to be supported. Even if the attachment of conditions to GPP is upheld, then it is unclear what the response of the states might be to such arrangements. Potentially, given the increased reliance of the state and territory governments on federal funding from the GST, it is possible that nearly every construction project conducted by the states could be deemed to be included under Stage Two of the Scheme

### **3.3.4 Difficulties with the Scheme**

There are some difficulties with this scheme. While potentially nearly every construction project conducted by governments could come under the ambit the Scheme, this does not result in and of itself in harmonised OH&S regulations. Instead, construction projects conducted by the states, which are funded by the Commonwealth, would need to comply both with the OFSC Scheme and with state or territory government OH&S legislation as well. This is certainly the opinion of Cole (2003) who felt that the application of conditions to Commonwealth funding would mean that there were effectively two separate systems of regulation to every site, and that such a situation would be likely to undermine safety on the site, not improve it. Thus the conflicting and overlapping of OH&S powers resulting from multiple systems – would more than likely create more confusion, and not reduce it.

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### 3.3.5 Summary – The OFSC Scheme as a mechanism for OH&S harmonisation

Consequently, this initiative, while it results in duplication of requirements, rather than harmonisation of requirements, is argued to be an example of ‘unilateral exercise of power by the Commonwealth (Option 1 from Table 2.1), as shown in the figure below.

**Figure 3.5 Level of harmonisation for Australian Government Building and Construction OH&S Accreditation Scheme**

<b>Unilateral Exercise of Power by the Commonwealth</b>
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
Non-Binding National Standards Model
Exchange of Information
Independent Unilateralism

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## 4. DEVELOPMENT OF A VOLUNTARY CODE OF PRACTICE

In 1995, the then Industry Commission, since renamed the Productivity Commission, recommended that industries develop voluntary standards and codes of practice for OH&S. Specifically the Industry Commission argued that “codes of practice developed by others in the same industry would help to define what would be regarded by the courts as ‘reasonably practicable’” and that in “a *de facto* sense, it will have the force of law. When the courts consider whether a duty of care has been met, they will turn to such codes as representing industry custom and practice”, (Industry Commission 1995, p.50). Gunningham (1996) argued that such recommendations were deficient on a number of grounds. Firstly that the voluntary nature of the voluntary codes ‘lack clout’, and would result in a lowering of standards in workplaces, although acknowledging some value in industry specific codes Gunningham (1996). The following year, brought a change of heart with Gunningham and Rees (1997, p. 363) arguing that industry self-regulation, such as voluntary codes of practice, could be “remarkably effective and efficient” in ensuring compliance with certain standards.

As argued elsewhere (Charles et al 2007), there is considerable utility for a voluntary code of practice (VCOP) to be developed by industry and Cole (2003) in fact endorses such a move. The CRC for Construction Innovation has sponsored a working party of leading industry organisations and companies who developed a set of guidelines for OH&S in the construction sector after extensive consultation with industry (*Construction Innovation 2007*). Various states and territories are currently reviewing the guidelines and how these may relate to their OH&S regulations. Thus the CRC for Construction Innovation acted as a mediating institution to sponsor an industry developed voluntary code of practice for the construction industry.

As Gunningham and Rees (1997, p.371) argue “mediating institutions are especially well positioned to promote shared ethical practices within industry”. This is because mediating institutions understand an industry and are able to provide important normative frameworks for action in the industry. “Rational action is always grounded in social context that specifies appropriate means to particular ends; action acquires its very reasonableness in terms of these social rules and guidelines for behaviour. Here choices are structured by socially mediated values and normative frameworks. Actors conform not because it serves their individual interests narrowly defined, but because it is expected of them” (Scott 1995, p. 38-39). Mediating institutions thus can help to establish industry norms, and establishing the accepted benchmark of behaviour for that industry. Industry generated codes of practice can thus function as mechanisms to “challenge, question, guide and set limits around economic considerations by giving voice to other considerations of what is good for the company, the industry and society” (Gunningham and Rees 1997, p. 376).

The Guidelines for Best Practice within the construction industry developed by *CRC Construction Innovation* can thus help to establish a minimum code of conduct for behaviour in the industry. If adopted by the vast majority of construction firms, it may well form the basis for harmonisation of some critical aspects of practice, particularly if it assists firms to comply with the performance based legislation. Gunningham and Rees (1997) suggest how this might work in practice:

Government prescribes a particular outcomes (a very broad general duty to ensure health and safety as far as reasonably practical) but does not prescribe what method industry must adopt to achieve it. However a code of practice is developed by industry, trade unions and government ... it identifies one acceptable way of meeting the general duty requirement ... similarly compliance with a voluntary code might be taken as evidence of “due diligence”, where this is a defence to a penal charge. (Gunningham and Rees 1997, p.401).

Further longitudinal research is needed to ascertain the uptake of the guidelines into a voluntary code of practice and how this might affect regulatory harmonisation in Australia. How well the code is adopted and the reception it receives by various legislatures remains to be seen.

**Figure 4.1 Level of harmonisation for the construction industry voluntary code of practice**

Unilateral Exercise of Power by the Commonwealth
Reference of Power to the Commonwealth
Incorporation by Reference
Complementary or Mirror Legislation
Mutual Recognition
Agreed Legislation/ Policies
Adoptive Recognition
<b>Non-Binding National Standards Model</b>
Exchange of Information
Independent Unilateralism

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## 5. DISCUSSION

Various reports such as Cole (2003) and the Productivity Commission (Australian Government 2004a, 2004b) noted submissions from unions, firms and industry associations arguing for increased harmonisation of OH&S regulations. In these inquiries, the states consistently held that they would not refer their powers to the Commonwealth and upheld that they had head of power over OH&S and workers compensation. However, as the Australian Government (2004a) has noted, the various attempts to improve consistency “have not led to a national framework of regulation or enforcement, nor have they addressed the compliance concerns and associated costs of multi-state employers” (Australian Government 2004a, p.71).

This report examined four initiatives that have attempted to improve OH&S harmonisation in Australia.

With the *Comcare* initiative, national firms can ‘opt out’ of state based OH&S workers compensation schemes. Uptake to this initiative has been limited to date. However, the recent High Court ruling which upheld the right of the Government, to implement the initiative, may result in a significant increase in large firms opting out, if there are perceived benefits for organisations.

The *NOHSC standards* hold significant promise for harmonisation. Depending on how the notion of adoption is interpreted, the NOHSC standards have either been a significant success or a very limited success, although the consensus in reports is that they have not achieved a high level of success to date. If the objective was to share information across state and territory governments, then the NOHSC standards have been successful. This report takes the position that unless the standards are formally adopted into legislation on an ‘as is’ basis, they do not realistically form the basis of harmonisation. This review of the adoption of the standards indicates that adoption of NOHSC standards into legislation has been limited and patchy to date, apparently largely due to unreconciled differences between the national standards and the state and territory legislation. The recent initiative of ASCC to identify common and core elements of OH&S regulations across the state may help to resolve the impasse, but how effective it will be remains to be seen.

The *OFSC* was set up following Cole, and has hitherto extended to the projects directly funded by the Commonwealth government. Recently this was extended to projects which are indirectly funded by the Commonwealth government. As noted in the case study, this is a significant change in the federal funding arrangements, and could potentially apply to nearly every large construction project initiated by governments. There is potential for this initiative to increase friction between the commonwealth and the states, As this initiative has just been implemented, the effectiveness of implementation will need to be determined. Speculation has been rife in the media concerning the possible implications of a change in federal government given the impending federal election. Most media commentators feel that initiatives such as those outlined in this report are likely to be continued in some form by an incoming Labor government (Milne 2007, Burrell 2007).

Guidelines for establishing best practice for construction safety has likewise just been initiated, and holds potential for harmonising practice and lifting the bar on acceptable behaviour in the industry .



## 6. IMPLICATIONS FOR PUBLIC POLICY THEORY

As noted in the introduction, a number of areas of public policy, including OH&S, are the responsibility of the states with a limited role accorded to the Commonwealth under the Australian Constitution. The challenge inherent in such arrangements is that firms working across jurisdictional borders face costs associated with having to adapt to different compliance and registration regimes. We set out a number of ways in which increased harmonisation can be achieved in federal systems of government and used this framework to analyse each approach.

However, it is possible to take a step back and view these various initiatives from a wider perspective. Here the various models advanced by Wright (1978) are useful in analysing the overall approach of the various spheres of government.

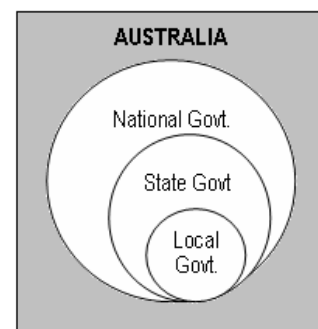
Table 5 – Summary of impact of harmonisation initiatives on the sphere of influence of governments

Initiative	Impact on the Commonwealth Sphere of Influence	Impact on the state / territory sphere of influence
Comcare – Opting Out	Increase the number of firms under Commonwealth insurance schemes. There has been limited uptake to date, although this may change following the High Court case.	Decrease in the number of firms in state based insurance schemes. If enough firms switch across, then the state based insurance schemes may become unviable.
NOHSC standards	The ASCC is taking a third approach to the harmonisation of legislation – identifying a core and working from there.	None apparent, although modification to a national system may occur in the long term.
OFSC	The Commonwealth is extending its accreditation and compliance requirements to projects indirectly funded by the Commonwealth through the GST. As states become increasingly reliant on GST revenue, more and more projects will be caught under this scheme. Initially this will lead to need to comply with both state and federal regimes.	The initial impact is a duplication of requirements for audit and investigation and compliance. The long term impact could be a need to be assessed, although increased tensions appear to be likely.
VCOP	This is industry driven so does not have a direct impact on Commonwealth sphere of influence.	This is industry driven so does not have a direct impact on state / territory sphere of influence. Sign off by state and territory governments would be required for this attempt to have significant impact, beyond the value to industry themselves.

In the literature review a representation of the various ways of perceiving the shared spheres of power of the levels of government in federated systems was articulated.

Various analysts (Burrell 2007; Milne 2007) would argue that the Commonwealth is attempting to increase the sphere of operations for the national government and reduce the role of the states to that of delivery agencies. Two of the four initiatives outlined in this report would seem to support model three as the preferred model of the Commonwealth government.

The NOHSC standards have been developed as a cooperative arrangement and thus have not influenced the sphere of operations. Whether this changes in the future is not clear.



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## 7. CONCLUSION

Harmonisation is a framework that is argued to provide a way of organising complex regulatory approaches. Various reports such as the Cole Commission (2003) and the Productivity Commission (Australian Government 2004a, 2004b) argued the case for increased harmonisation of OH&S regulations. This paper examined four initiatives that have attempted to improve OH&S harmonisation in Australia.

With the Comcare initiative, national firms can 'opt out' of state based OH&S workers compensation schemes, although uptake of this initiative has been limited to date. The recent High Court ruling which upheld the right of the Government to implement the initiative, may lead to significant increase, if enough construction firms perceive benefit in doing so. At the moment, however, this initiative still entails independent action by Australian jurisdictions, and is likely to remain so unless there is significant uptake by industry.

The NOHSC standards continue to hold significant promise for harmonisation. If the objective of the standards was to share information across state and territory governments, then the NOHSC standards have been successful. However, the standards need to be universally adopted into legislation in order to effectively form the basis of harmonisation. Recent COAG initiatives may lead to improved consistency of OH&S regulation across the country, particularly through identifying common and core elements of OH&S regulations.

The Stage Two of the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme potentially extends the reach of the Commonwealth government requirements to all construction projects which are directly or indirectly funded by the Commonwealth government. Such a change does not encourage harmonisation directly, and in fact may, in the shorter term, increase overlap with duplicate accreditation schemes required on single construction sites.

An industry sponsored and led voluntary code of practice or industry best practice approach may lead to the establishment of standardised benchmarks for OH&S practice in the industry, provided it can garner the necessary critical mass within industry. Further research is needed to determine the outcome of such an initiative, particularly with regard to how it might relate to extant state and territory legislation.

Given the recent federal election, and the implementation of an incoming minister for deregulation, it will be interesting to see whether the initiatives reviewed in this report continue, or whether there is a 'third way' which has yet to be identified and explored.

## APPENDIX A - ADOPTION OF NOHSC STANDARDS

Table A.1 – Status of adoption of NOSCH standards as at 1 November 2007

NOHSC Number	Name	ACT	NSW	NT	QLD	SA	Tas	Vic	WA
2002 (2005) 2	Safe Removal of Asbestos 2nd Edition	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Replaced with State COP	Referenced on Work Cover website & in Work Cover Guide		Adopted in Legislation
2018 (2005) 2	Code of Practice for the Management and Control of Asbestos in the Workplace	Adopted in Legislation		Adopted in Legislation	Adopted in Legislation	Replaced with State COP			Adopted in Legislation
3003 (2005) 2	Guidance Note on the Membrane Filter Method for Estimating Airborne Asbestos Fibres 2nd Edition	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation		Adopted in Legislation		Adopted in Legislation	Adopted in Legislation
1003 (1995) 2	Adopted National Exposure Standards For Atmospheric Contaminants In The Occupational Environment	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation		Adopted in Legislation	Adopted in Legislation
3008(1995)	Guidance Note on the Interpretation of Exposure Standards for Atmospheric Contaminants in the Occupational Environment 3rd Edition	Adopted in Legislation	Adopted in Legislation					Referenced in State COP	Adopted in Legislation
1011 (1995)	National model regulation for the control of scheduled carcinogenic substances							Adopted in Legislation	
2014 (1995)	Code of Practice for the Control of Scheduled Carcinogenic Substances								
7025 (1998)	Guideline - Integrating OHS competencies into national industry competency standards								

NOHSC Number	Name	ACT	NSW	NT	QLD	SA	Tas	Vic	WA
1016 (2005) 1	National Standard for Construction Work	Adopted in legislation	Topic referred to in State COPs  (In own leg)	Adopted in Legislation	Adopted in Legislation	OHS Regs under review re: Const. Work	Replaced with Work Cover Guide	Being Considered by Work Cover  (In own leg)	New Legislation will come in early 2008 (WorkSafe)
1015 (2001)	National Standard for the Storage and Handling of Workplace Dangerous Goods	Replaced with own Legislation (re: Work Cover Guide )	Adopted in Legislation	Adopted in Legislation		Referenced in State COP		Implied in Government Annual Report	
2017 (2001)	National Code of Practice for the Storage and Handling of Workplace Dangerous Goods	Adopted in Legislation		Adopted in Legislation		Replaced with State COP		Replace with State COP	
3009 (1990)	Guidance Note for Placarding Stores for Dangerous Goods and Specified Hazardous Substances					Adopted in Legislation			
3020 (1994)	Guidance Note for the Development of Tertiary Level Courses for Professional Education in Occupational Health and Safety								
3019 (2003)	Guidance Note for the Elimination of Environmental Tobacco Smoke in the Workplace								
2008 (1992)	National Code of Practice for the Safe Use of Ethylene Oxide in Sterilisation/Fumigation Processes		Referenced in State COP	Adopted in Legislation					
3016 (1992)	Guidance Note for the Safe Use of Ethylene Oxide in Sterilisation/Fumigation Processes								
1005 1	<b>National Model Regulation</b> for the Control of Workplace Hazardous Substances	Adopted in Legislation	Referenced in State COP	Adopted in Legislation	Adopted in Legislation	Referenced in State COP	Adopted in Legislation	Adopted in Legislation	

NOHSC Number	Name	ACT	NSW	NT	QLD	SA	Tas	Vic	WA
2007 (1994)	National Code of Practice for the Control of Workplace Hazardous Substances	Implied adoption in draft government document	Referenced in State COP	Adopted in Legislation		Replaced with State COP		Referenced in Work Cover Training Materials	Implied On Work Cover website
3017 (1994)	Guidance Note for the Assessment of Health Risks Arising from Hazardous Substances in the Workplace		Referenced in State COP					Referenced in State COP	Adopted in Legislation
1008 (2004)	Approved Criteria for Classifying Hazardous Substances	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Referenced on Work Cover website	Adopted in Legislation	Adopted in Legislation
3018 (1994)	Guidance Note for the Control of Workplace Hazardous Substances in the Retail Sector		Referenced in State COP						Adopted in Legislation
7039 (1995)	Guidelines for Health Surveillance		Referenced in State COP			Referenced in State COP		Referenced in State COP	
2010 (2003)	National Code of Practice for the Control of Work Related Exposure to Hepatitis and HIV (blood-borne) Viruses	Adopted in Legislation		Adopted in Legislation			Referenced on Work Cover website		
	Workplace Injury and Disease Recording Standard in the Workplace					Adopted in Legislation			
1012 (1994) 2	National Standard for the Control of Inorganic Lead at Work	Adopted in Legislation			Adopted in Legislation		Adopted in Legislation	Adopted in Legislation	
2015 (1994)	National Code of Practice for the Control and Safe Use of Inorganic Lead at Work	Adopted in Legislation	Referenced in State COP	Adopted in Legislation			Referenced in Work Cover Guide	Referenced in State COP	Referenced in State COP
1013 (1995)	National Standard for Limiting Occupational Exposure to Ionizing Radiation	Adopted in Legislation							
3022 (1995)	Recommendations for limiting exposure to ionizing radiation (1995)								

NOHSC Number	Name	ACT	NSW	NT	QLD	SA	Tas	Vic	WA
2012 (1994)	National Code of Practice for the Labelling of Workplace Substances	Implied adoption in two government documents	Referenced in State COP	Adopted in Legislation	Adopted in Legislation	Replaced with State COP	Adopted in Legislation	Referenced in State COP	Adopted in Legislation
	National Standard for Licensing Persons Performing High Risk Work			Implied on Work Safe Website		Referenced in Safe Work Guide	Adopted in Legislation	Adopted in Legislation	Referenced on Work Cover Bulletin
7019 (1992)	National Guidelines for OHS Competency Standards for the Operation of Loadshifting Equipment and Other Types of Specified Equipment		Adopted in Legislation		Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation
1006 (2001) 1	National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment - 3rd Edition	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation
1014 (2002)	National Standard for the Control of Major Hazard Facilities			Adopted in Legislation				Adopted in Legislation	Referenced in State COP
2016 (1996)	National Code of Practice for the Control of Major Hazard Facilities			Adopted in Legislation		Implied in DIAS Annual Report		Adopted in Legislation	Referenced in State COP
3015 (1996)	Guidance Note For The Prevention Of Occupational Overuse Syndrome In The Manufacturing Industry								
1001 (1990) 1	National Standard for <b>Manual Handling</b>	In own leg	Adopted in Legislation	Referenced in COP	Referenced in State COP & Replaced with State COP	Replaced by state COP	Adopted in Legislation	Replaced with State COP	Referenced in State COP
2005 (1990) 1	National Code of Practice for <b>Manual Handling</b>	In own leg		Adopted in Legislation		Replaced with State COP	Referenced on Work Cover website		

NOHSC Number	Name	ACT	NSW	NT	QLD	SA	Tas	Vic	WA
2011 (2003) 1	National Code of Practice for the Preparation of <b>Material Safety Data Sheets</b> 2nd Edition	Adopted in Legislation	Referenced in State COP	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Adopted in Legislation	Referenced in State COP	Adopted in Legislation
1007 (2000) 1	National Standard for <b>Occupational Noise</b>	Adopted in Legislation	Referenced in Work Cover Guide	Adopted in Legislation	Replaced with State COP	Replaced with Work Cover Guide	Reference in work cover guide	Referenced in Health and Safety Guide	Referenced in state code of practice
2009 (2004) 1	National Code of Practice for <b>Noise Management</b> and Protection of Hearing at Work - 3rd Edition	Adopted in Legislation	Referenced in State COP	Adopted in Legislation		Reference Australian Standard in Legislation	Referenced in Work Cover website		Referenced in State COP
12004 (1991) 1	Control Guide Management of Noise at Work		Referenced in State COP						Referenced in State COP
3021 (1995)	Guidance Note for the Best Practice Rehabilitation Management of Occupational Injuries and Diseases								
2013 (1994)	National Code of Practice for the Prevention of Occupational Overuse Syndrome	Adopted in Legislation		Adopted in Legislation					Referenced in State COP
3005 (1996)	Guidance Note for the Prevention of Occupational Overuse Syndrome in Keyboard Employment								
3015 (1996)	Guidance Note For The Prevention Of Occupational Overuse Syndrome In The Manufacturing Industry								
1010 (1994) 1	National Standard for <b>Plant</b>	Adopted in Legislation	Referenced in RTA Guide (In own leg)	Referred to for further information	Adopted in Legislation	Referenced in Work Cover Guide (In own leg)	Adopted in Legislation	Replaced with State COP	Replaced with State COP
	Guidance on the Principles of Safe Design for Work								

NOHSC Number	Name	ACT	NSW	NT	QLD	SA	Tas	Vic	WA
1004 (1990)	National Standard for Synthetic Mineral Fibres	Adopted in Legislation							
2006 (1990) 2	National Code of Practice for the Safe Use of Synthetic Mineral Fibres	Adopted in Legislation		Adopted in Legislation		Replaced with State COP	Referenced on Work Cover website		
3006 (1989)	Guidance Note on the Membrane Filter Method for the Estimation of Airborne Synthetic Mineral Fibres					Adopted in Legislation			
2003 (1989) 2	National Code of Practice for the Safe Handling of Timber Preservatives and Treated Timber	Adopted in Legislation		Adopted in Legislation		Replaced with State COP			
3007 (1989) 2	Guidance Note for the Safe Handling of Timber Preservatives and Treated Timber					Referenced in State COP			
3012 (1991)	Guidance Note for the Protection of Workers from Ultraviolet Radiation in Sunlight	Adopted in Legislation							
2004 (1990)	National Code of Practice for the Safe Use of Vinyl Chloride	Adopted in Legislation							

**Note:** The Commonwealth Government has legislation adopting all NOHSC standards and codes of practice.

### Legend

COP – code of practice

“Adopted” means adopted in the literal sense. The NOHSC or a national standard, national code of practice or guidance notes are directly referred to in legislation.

“In own leg” means that the state has not explicitly referred to the NOHSC standard or a national standard in their legislation, but in essence, the state legislation addresses the standard.

### Web Search Details

First search - “NOHSC” on all CIBE Sharepoint OH&S documents (Acts/Regs/state and territory COP/Guides) for each state and territory.

Second search – “national standard” safety inurl:. (note – very few of the CIBE Sharepoint documents came up on this search).

Third search – “national occupational”, “national code”, “national standard” and “nohsc” in State and Territory WorkCover websites and legislation websites.



## Appendix B - TIMELINES OF THREE INITIATIVES

### B.1 Comcare legislation and other pertinent history timeline

1988 *Safety, Rehabilitation and Compensation Act 1988*

1991 *Occupational Health and Safety (Commonwealth Employment) Act 1991*

1992 Amendments to SRC Act making Comcare available to select private sector corporations

2004 Optus granted licence

2004 PC Inquiry Report *National Workers' Compensation and Occupational Health and Safety Frameworks*

2005 *OHS and SRC Legislation Amendment Bill 2005*

2006 *OHS and SRC Legislation Amendment Act 2006*

2006 Due to Amendment Act, the *Occupational Health and Safety (Commonwealth Employment) Act 1991* renamed to *Occupational Health and Safety Act 1991 (Cth)*

2006 Due to the Amendment Act, Comcare made available to any eligible private corporation

2007 *Attorney-General (Vic) v Andrews* High Court ruling

### B.2 Comcare approvals

Table B.2.1 Timetable of Comcare Approvals

Year	Signed	Effective	Commencement
1992			1 <sup>1</sup>
1993			
1994			2 <sup>1</sup>
1995			
1996			1 <sup>1</sup>
1997			
1998			
1999	1	1	2 <sup>1</sup>
2000			
2001			1 <sup>1</sup>
2002	7	7	
2003			
2004	4	3 Toll <sup>2</sup> + 1	
2005	3		1
2006	6	9	2 Linfox <sup>3</sup> + 1
Up to 9/2007	4	4	3 JH <sup>4</sup> + 3

Notes:

<sup>1</sup> Previously held a declaration of eligibility under the former section 108C of the SRC Act.

<sup>2</sup>Toll, <sup>3</sup>Linfox, <sup>4</sup>John Holland - parent company and subsidiaries issued individual licences at same time.

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### B.3 NOHSC and ASCC

Based on the evolution of NOHSC and the ASCC due to changes in governments and priorities over the years, the rate of developing national standards and codes of practice by NOHSC and, subsequently, the ASCC has fluctuated, as is demonstrated in Table B.3.3 below:

**Table B.3.2 NOHSC/ASCC Development of National Standards and Codes of Practice by year**

<b>Year</b>	<b>No. of National Standards Developed</b>	<b>No. of Codes of Practice Developed</b>
1989		1
1990	2	1
1991		
1992		1
1993		
1994	3	4
1995	2	1
1996		1
1997		
1998		
1999		
2000	1	
2001	2	1
2002	1	
2003		2
2004	1	1
2005	1	2
2006		
2007	1	1

(ASCC 2007a)

### B.4 OFSC Accreditation Scheme Timeline

12 September 2005 - *Building and Construction Industry Improvement Act 2005* comes into effect.

November 2005 - The OFSC begins accepting applications.

Late 2005 - Onsite auditing of head contractors begins.

1 July 2006 - OFSC begins accepting applications for full accreditation

September 2007 - The *Building and Construction Industry Improvement Amendment (OHS) Bill 2007* is passed.

1 October 2007 - Stage Two of the Scheme takes effect.

(DEWR 2007c)

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